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June 27, 2003

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Via Hand Delivery

The Honorable Gale A. Norton
Secretary of the Interior
U.S. Department of the Interior
Room 6156
1849 C Street, NW
Washington, DC 20240

The Honorable Steven A. Williams
Director, U.S. Fish and Wildlife Service
U.S. Department of the Interior
Room 3258
1849 C Street, NW
Washington, DC 20240

The Honorable Kathleen B. Clarke
Director, Bureau of Land Management
U.S. Department of the Interior
Room 5659
1849 C Street, NW
Washington, DC 20240

Re: Notice of An Endangered Species Act Citizen Suit Concerning the Mojave Desert Distinct Population Segment of the Desert Tortoise

Dear Secretary Norton and Directors Williams and Clarke:

Pursuant to § 11(g)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. 1540(g)(2), this letter provides you with advance notice of a suit against the Department of the Interior ("Department") and two of its agencies – the United States Fish and Wildlife Service ("FWS" or "Service") and Bureau of Land Management ("BLM" or "Bureau") – to correct violations of the ESA concerning the desert tortoise, *Gopherus agassizii* ("the desert tortoise"), and its population in the Mojave desert ("Mojave tortoise population"). The Complaint, in addition to challenging violations of the ESA, may assert claims under the Administrative Procedure Act ("APA"), Federal Land Policy and Management Act ("FLPMA"), National Environmental Policy Act ("NEPA"), and other laws.

This notice is provided on behalf of: (1) six Counties within the four States in the Mojave Desert region (Mohave County, Arizona; Imperial, Kern, and San Bernardino Counties, California; Lincoln County, Nevada; and Washington County, Utah) (collectively, the "Counties"); and (2) the QuadState County Government Coalition ("Coalition"), a California Joint Exercise of Powers Act (California Government Code §§ 6500 *et seq*.) agency, whose members include the County governments cited above. The vast majority of the designated critical habitat of, and recovery units for, the Mojave tortoise population lies within these Counties.

In a final rule published at 55 Fed. Reg. 12170 (April 2, 1990), FWS determined that: (1) the Mojave tortoise population constitutes a "distinct population segment" ("DPS") under the ESA § 3 definition of "species"; and (2) the Mojave tortoise population warranted determination ("listing") as, and determined ("listed") it to be, a "threatened species." In a second final rule published at 59 Fed. Reg. 5820 (Feb. 4, 1994), FWS designated over 6.4 million acres as "critical habitat" for the Mojave tortoise population. Later in 1994, FWS adopted the Desert Tortoise (Mojave Population) Recovery Plan (FWS June 1994) ("Tortoise Recovery Plan" or "Plan").

To implement the Tortoise Recovery Plan and the critical habitat designation, the Department has recently adopted or promoted two different categories of actions that cause direct and imminent hardship to the Counties and Coalition members. The first category of actions consists of the acquisition and preservation of extensive non-federal lands (due to overbroad designation of 6.4 million acres of critical habitat and the comparable Tortoise Recovery Plan). These actions greatly reduce the Counties' tax bases, but without adequate compensation through the Payment in Lieu of Taxes ("PILT") program. These actions include: (1) land acquisition by Department agencies; and (2) acquisition of, and land use restrictions on, non-federal lands pursuant to FWS's encouragement under ESA §§ 7, 9, and 10, and as compensation/mitigation lands under other statutes, where the land is then conveyed to tax-exempt organizations. These actions will be referred to as the "Tortoise Land Acquisitions."

The second category of actions consists of land use constraints that BLM has recently adopted on federal lands. These actions implement and further the thrust of the Tortoise Recovery Plan and the critical habitat designation, by setting aside for tortoise preservation, and constraining economic multiple uses of, vast areas of BLM lands. The BLM actions were taken with FWS's concurrence and encouragement in ESA § 7 biological opinions dated June 17, 2002; March 2, 2000; August 12, 1998; and January 28, 1998 ("Tortoise BiOps"). BLM recently adopted or is poised to adopt at least the following land use constraints.

- On Dec. 19, 2002, BLM adopted the Northern and Eastern Colorado Desert Management Plan amendment ("NECO") to BLM's California Desert Conservation Area ("CDCA") Plan. NECO: (1) establishes two Desert Wildlife Management Areas ("DWMAs"), totaling about 1.75 million acres, as Areas of Critical Environmental Concern ("ACECs") for recovery of the Mojave tortoise population; and (2) imposes restrictions on routes of travel, grazing, and other economic uses of BLM lands (both inside and outside the DWMAs) to advance tortoise recovery. BLM adopted NECO after ESA § 7 consultation with FWS, and based on FWS's issuance of the 2002 Tortoise BiOp.

- On Dec. 20, 2002, BLM adopted the Northern and Eastern Mojave Desert Management Plan amendment ("NEMO") to BLM's CDCA Plan. NEMO: (1) establishes two DWMAs as ACECs, totaling over 312,000 acres, expressly for recovery of the Mojave tortoise population; and (2) imposes restrictions on routes of travel, grazing, and other economic uses of BLM lands (both inside and outside the DWMAs) to advance tortoise recovery. BLM adopted NEMO after ESA § 7 consultation with FWS, and based on FWS's issuance of the 2002 Tortoise BiOp.

- Within Arizona, Nevada, and Utah, from 1998 through 2000 BLM adopted land use planning measures for the protection of the Mojave tortoise population in the Arizona Strip Resource Management Plan ("RMP") Amendment, the Caliente (Nevada) Management Framework Plan ("MFP") Amendment, and the Dixie RMP in Utah. These land use plan and plan amendments established large-acreage DWMAs or ACECs to be managed for tortoise conservation, and limited economic multiple uses within those designated areas.

- BLM may adopt in 2003 the West Mojave Plan amendment, which would formally establish the Fremont-Kramer DWMA. In the interim, BLM has relied on the Tortoise Recovery Plan and critical habitat designation (and has treated the Fremont-Kramer DWMA as being *de facto* established) by adopting the series of road closures and grazing reduction actions described in Summary of Desert Tortoise Recovery Actions – Western Mojave Recovery Unit 6-13 (Desert Managers Group Nov. 2002) and related BLM documents.

The tortoise land use constraints on BLM lands will be referred to as the "Tortoise Recovery Amendments" or "Amendments." The Tortoise Recovery Amendments economically injure the Counties and other Coalition members in several ways. For example, they reduce the Counties' share of grazing and other revenues on BLM lands under 43 U.S.C. 315i. The amendments also adversely impact the Counties' tax bases, such by making grazing less economic on non-federal lands by causing the termination of ranching operations and disposal of private ranch lands, by decreasing the dollars spent by off-road vehicle recreationists, and by generally limiting access across BLM lands. Further, the closing of roads previously accessible for the Counties' fire and police protection services has adverse consequences for public safety.

The final agency actions on the Tortoise Land Acquisitions, Tortoise Recovery Amendments, and the Tortoise BiOps[1] create the imminent hardships required for the existence of a ripe controversy on, and for the Counties' and Coalition's standing to challenge, the actions on which those Acquisitions and Amendments are based (e.g., the DWMAs and other land use constraints recommended in the Tortoise Recovery Plan and the critical habitat designated in rulemaking).

[1] Collectively, these will be called the "Acquisitions and Amendments." The Tortoise BiOps themselves are final agency actions subject to judicial review. Claims against FWS concerning its biological opinions are reviewed under the APA and need not be preceded by advance notice of an ESA § 11(g) citizen suit. *See Bennett v. Spear*, 520 U.S. 154, 174-79 (1997).

See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998).[2] In *Ohio Forestry*, a unanimous Supreme Court found that a general challenge to a forest plan for a national forest is not ripe for judicial review. Instead, a ripe controversy exists only when a federal land use plan "incorporate[s] a final decision to close a specific area to off-road vehicles" (as the Tortoise Recovery Amendments do here) or when the agency is poised to take (or refrain from taking) some other site-specific land use activity which more imminently injures the plaintiff. 523 U.S. at 738-39; *see id*. at 733-37; *see National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. __, 123 S. Ct. 2026 (2003).

Once such an implementing action is "more imminent and more certain," this allows judicial review of a "challenge to the lawfulness of the [earlier] Plan" (here, the Tortoise Recovery Plan and the ESA designation of critical habitat) to the extent those earlier decisions "play[] a causal role with respect to the future, then-imminent, harm from" site-specific land use direction. *Id*. at 734. The Tortoise Recovery Plan and the ESA designation of critical habitat were "causes" of the Acquisitions and Amendments, as those land use constraints would not have been adopted if the Tortoise Recovery Plan and critical habitat designation had not recommended or designated the preservation of a large acreage of lands. Thus, the Counties' and the Coalition's challenges to the Tortoise Land Acquisitions, Tortoise Recovery Amendments, the Tortoise BiOps, the Tortoise Recovery Plan, and the critical habitat designation are all ripe for judicial review under *Ohio Forestry* and its progeny. *See Park Lake Resources LLC v. U.S. Dept. of Agriculture*, 197 F.3d 448, 453 (10th Cir. 1999) (federal landowner's designation of a research natural area (analogous to designation of critical habitat) is not ripe for review; if the Forest Service later restricts "mining activities, Park Lake may challenge those restrictions and the RNA designation in one suit"); *Ecology Center v. U.S. Forest Service*, 192 F.3d 922 (9th Cir. 1999) (claims of inadequate forest-wide monitoring (analogous to the monitoring promised in the Tortoise Recovery Plan) is ripe only in a challenge to an action which more imminently injures and causes hardship to plaintiff); *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 47-49 (D.C. Cir. 1999) (NEPA claim not ripe until final agency action injuring plaintiff is more certain); *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 244 (10th Cir. 1991) (FLPMA and NEPA challenges not ripe until second-level action injuring plaintiff is about to occur).

Stated another way, the time clock for calculating the six-year statute of limitations under 28 U.S.C. 2401(a) for challenges to the Tortoise Recovery Plan and the ESA designation of critical habitat either does not start until those documents are applied in some fashion that injures plaintiffs or restarts when the Tortoise Recovery Amendments created a justiciable ripe controversy in 2002. *See Atlantic States Legal Foundation v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003) ("the time limit does not begin to run until the claim ripens"; earlier challenge to regulations before they are applied in some fashion that injures plaintiffs (similar to the recommendations on uses of BLM lands in the Tortoise Recovery Plan and the rule designating critical habitat) found not ripe); *Association of American Railroads v. Surface Transportation Bd.*, 146 F.3d 942, 945 (D.C. Cir. 1998) (same); *Dunn-McCampbell Royalty Interest, Inc. v.*

[2] Counsel for the Counties and Coalition served as counsel for the successful petitioners in *Ohio Forestry Ass'n*.

National Park Service, 112 F.3d 1283, 1287 (5th Cir. 1997) ("an agency's application of a rule to a party creates a new, six year cause of action" to challenge an earlier-adopted rule). As a result, the Counties and Coalition can bring their claims against the Tortoise Recovery Plan and the critical habitat designation at this time.

I. ESA Violations Concerning The Tortoise Recovery Plan, And Its Implementation In The Tortoise Land Acquisitions And Tortoise Recovery Amendments

The Tortoise Land Acquisitions and BLM's Tortoise Recovery Amendments are designed to implement the Tortoise Recovery Plan. The Acquisitions and Amendments implement the Plan's recommended use of DWMAs and access constraints to assist in recovery of the Mojave tortoise population. *See* Tortoise Recovery Plan at 31-61. As FWS summarized in the 2002 Tortoise BiOp on NECO and NEMO:

> The recovery plan for the desert tortoise is the basis and key strategy for recovery and delisting of the desert tortoise. The plan divides the range of the desert tortoise into six distinct population segments or recovery units and recommends the establishment of 14 desert wildlife management areas throughout the recovery units. Within each [DWMA], the recovery plan recommends implementation of reserve level protection of desert tortoise populations and habitat.... As part of the actions needed to accomplish recovery, land management within all [DWMAs] should restrict human activities that negatively affect desert tortoises (Service 1994c).
>
> Four recovery units identified in the recovery plan are located in...the California Desert Conservation Area.
>
> The Bureau's proposal to designate all lands within [DWMAs] as Class L should provide increased protection to the desert tortoise and its habitat over that currently provided by Class M guidance.... The proposal to limit the cumulative amount of ground disturbance to one percent should ensure that the vast majority of public lands within the [DWMA] is managed for the conservation of the desert tortoise.
>
> The designation of routes in [DWMAs], with an overall reduction in the amount of the road network should benefit the desert tortoise. As we have mentioned previously, determining the extent that the change in routes affects the desert tortoise may be difficult to measure.... In the Northern and Eastern Mojave planning area, the desert tortoise will benefit from the Bureau's proposal to...[substantially reduce] grazing use....
>
> As we noted in the Status of the Species section of this biological opinion, however, the number of desert tortoises has declined over large portions of the range. We cannot, at this time, determine the exact cause of this decline although upper respiratory tract disease is likely a factor; drought and human-induced perturbations are likely additional factors that contribute to the species' decline

2002 Tortoise BiOp at 30-31, 58-59 (emphasis added); *see* March 2, 2000 BiOp on Caliente MFP Amendment at 4 ("the Bureau proposes to designate three ACECs with management prescriptions based on Recovery Plan recommendations"); August 12, 1998 BiOp on Dixie RMP

at 5 ("The proposed action...ensure[s] that it [the Dixie RMP] implements the Desert Tortoise Recovery Plan (Service 1994)"); January 28, 1998 BiOp on Arizona Strip RMP Amendment at 6 ("The proposed action is to amend the 1990 Arizona Strip RMP (Bureau 1990a) to implement the desert tortoise recovery plan").

The following aspects of the Tortoise Recovery Plan, and its implementation in the Acquisitions and Amendments, violate the ESA and APA.

A. FWS Has Failed To Conduct The Monitoring And Reassessments Required By The Tortoise Recovery Plan

The Tortoise Recovery Plan recommended recovery strategies based on the scant and indefinite information available in 1994 on what might be causing decreases in the Mojave tortoise population. The Plan (at 3-10) suggests that the Mojave tortoise population may be threatened by many factors, including disease, drought, predation, off-road vehicle ("ORV") use, and grazing. Instead of being selective, the Plan recommends recovery strategies directed against all of these assumed causes of population declines, including significant constraints on public use of public lands (e.g., the DWMAs, restricting ORV use and grazing). *See* Tortoise Recovery Plan at 31-62.

FWS and the recovery team members recognized that the Tortoise Recovery Plan advocates remedial strategies expensive to both governments and private parties based merely on guesses regarding the causes of the Mojave desert tortoise's population decline. Accordingly, FWS committed to research and monitoring "of the effectiveness of protective measures" and conducting a "population estimation every [3 to] 5 years." Tortoise Recovery Plan at 41, 54; *see id*. at 37, 51-54. The "Recovery Plan should be reassessed every three to five years" based on what the effectiveness monitoring discloses as to which measures are effective and ineffective for the survival and recovery of the Mojave tortoise population. *Id*. at 37.

The effectiveness monitoring, population surveys, and reassessment that the Recovery Plan committed to conduct have not occurred. As best we can tell, FWS treats, or more accurately dismisses, these commitments as meaningless "boilerplate" language. As a result, the Department, FWS, and BLM are arbitrarily imposing severe economic costs on users of BLM public lands and on Counties dependent on land use-related revenues by adopting the Acquisitions and Amendments recommended in the Recovery Plan, without adequate information on whether these land use constraints are truly necessary to address the critical needs of the Mojave tortoise population. Both Congress and the General Accounting Office ("GAO") leveled and substantiated the same criticism.

The Conference Report on the FY 2001 Interior Appropriations Act describes FWS's delays on the "population estimation," "desert tortoise monitoring," and "reassessment" promised in the "1994 Desert Tortoise Recovery Plan" and states that the "managers expect the Service to undertake this work in fiscal year 2001." H.R. Conf. Rep. No. 106-914, at 123 (2000). A colloquy on the Senate floor elaborates:

> Mr. Bennett. As the Chairman knows, I am deeply troubled that the United States Fish and Wildlife Service, Bureau of Land Management, and other federal agencies have

> moved very quickly to impose the land use controls recommended in the Recovery Plan, but have failed to undertake the basic tasks called for in that document to determine whether those land use controls are truly appropriate and are proving to be effective. I am speaking of three tasks: the desert tortoise monitoring that the Plan called "crucial to determining if desert tortoise populations are stationary, declining, or increasing"; the desert tortoise population estimations that the Plan stated would be made every three to five years; and the Plan's reassessment that also was to be conducted every three to five years.
>
> Mr. Gorton. The Senator is correct. The Committee fully expects the USFWS to fulfill its commitments in the Recovery Plan....

146 Cong. Rec. S7038 (July 17, 2000). Despite this direction from Congress, the three required tasks have not been completed as of April 2003.

Most recently, as GAO stated in ENDANGERED SPECIES – RESEARCH STRATEGY AND LONG-TERM MONITORING NEEDED FOR THE MOJAVE DESERT TORTOISE PROGRAM (GAO-03-23, Dec. 2002) ("GAO Tortoise Report"):

> Population declines in the species may be caused in part by a contagious, and sometimes fatal, upper respiratory tract disease and by other factors such as drought, predation [e.g., by ravens], illegal collection, and habitat degradation or loss associated with human activities.... The listing decision, critical habitat designation, and recovery plan recommendations for the tortoise were based on diverse sources; as is often the case with an at-risk species, limited published research was available, and the Service also relied on unpublished research and government reports. Federal agencies and others, including BLM..., have taken a variety of actions to benefit desert tortoises, but the effectiveness of these actions is unknown because the necessary analyses have not been done. In response to recommendations in the recovery plan, agencies have restricted off-road motorized vehicle use, livestock grazing, and other activities.... Without knowing how effective the protective actions are, the Service and land managers cannot ensure that their limited resources are focused on the most effective actions. Furthermore, the recovery plan recommends reassessment of its findings and recommendations every 3 to 5 years in light of ongoing research. However, the Service has not reassessed the plan.... Given the controversy surrounding some of the recommended restrictions and the large number of acres and land users affected, we believe that it is important to ensure that management decisions are supported by research.
>
> Data are not available to demonstrate population trends so despite actions taken to benefit tortoises, the status of desert tortoise populations is unclear.... Expenditures on desert tortoise recovery exceed $100 million (in constant 2001 dollars) since the species' first listing in 1980....

GAO Tortoise Report at 1-4 (emphasis added); *see id*. at 12-20, 32-33.

These failings result in the following violations of the ESA and APA:

1. Arbitrary Decisionmaking – The Counties and Coalition agree with GAO that it is arbitrary under the APA for FWS to recommend, for BLM to adopt, and for both agencies to champion, costly land use restrictions before these "management decisions are supported by research" showing they are truly needed for the survival and eventual recovery of the Mojave tortoise population. GAO Tortoise Report at 3. FWS and BLM are engaged in a shoot-now-and-ask-questions-later approach.[3] The agencies are embracing land use restrictions now over broad areas without answering the critical question of whether such restrictions are effective means of promoting tortoise recovery. This constitutes arbitrary decisionmaking. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto, Ins. Co*., 463 U.S. 29, 43, 50-57 (1983).

More recent scientific opinion and research strongly suggest that the Mojave tortoise population is imperiled primarily by upper respiratory tract disease ("URTD"), by predation from ravens and other creatures, and by drought. *See* GAO Tortoise Report at 1, 6; 2002 Tortoise BiOp at 59. As Assistant Interior Secretary Manson stated in 2003, "disease and predation by ravens are among the foremost threats facing" the desert tortoise. Letter from Assistant Secretary for Fish and Wildlife and Parks Manson to Senator Robert Bennett at 2 (Jan. 22, 2003). If FWS and BLM cannot halt the deaths of adult desert tortoises from URTD and deaths of juvenile tortoises from predation by ravens, the Mojave tortoise population likely will go extinct. In that case, all the economic costs imposed by land use restrictions in the Tortoise Land Acquisitions and Tortoise Recovery Amendments will have been superfluous and ineffective to the extraordinary detriment of the Counties and Coalition and will not have achieved any long-lasting benefit for the Mojave tortoise population. Thus, the Tortoise Recovery Plan and the Acquisitions and Amendments are arbitrary in not focusing first on the primary threats to the persistence of the Mojave tortoise population.

Further, grazing has not been shown to cause declines in the tortoise population. *See* GAO Tortoise Report at 13-14, 17, 20 ("research has not yet established that livestock grazing has caused declines in desert tortoise populations"). Yet, pursuant to the Tortoise Recovery

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[3] In its defense, BLM has protested this approach of being forced to adopt land use zoning actions before the Tortoise Recovery Plan is reconsidered, but to no avail. The final EISs on NECO and NEMO both contain statements that:

> The [Desert advisory] Council recommends that BLM request the U.S. Fish and Wildlife Service to update the Desert Tortoise Recovery Plan and the BLM not implement the Recovery Plan or NEMO and NECO until the revision is complete and the on-going GAO audit completed and the report filed.
>
> Response: BLM wrote to the U.S. Fish and Wildlife Service on March 15, 2002, to request information on whether or not the Desert Tortoise Plan has been reevaluated, if there is a plan to do so in the future, and, if so, what the date is for a reevaluation. No response has been received to date. However, court stipulation deadlines and other factors require BLM to stay on schedule to issue final decisions on these plans by the end of the year [in 2002].

Final EIS on NECO at Volume II, p. S-3 (2002); Final EIS on NEMO at Volume II, p. U-4 (2002).

Plan, BLM has spent hundreds of thousands of dollars in canceling grazing permits and, under the Tortoise Recovery Amendments, BLM would forego millions of dollars more in grazing revenues that would be shared with the Counties under 43 U.S.C. 315i. *See id*. at 30 ("estimated effects of grazing restrictions on federal lands ranged from $3 million to $9 million"). These actions are arbitrary, in that they lack a sufficient scientific basis that grazing restrictions over large areas are truly essential for recovery of the Mojave tortoise population.

2. Violation Of Policy That Recovery Options Be Chosen To Minimize Adverse Socio-Economic Effects – FWS's published policy is that it will "[m]inimize the social and economic impacts of implementing recovery actions." 59 Fed. Reg. 34273 (July 1, 1994). This fulfills the intent of the 1988 Amendments to ESA § 4(f) that both recovery plans and implementing actions by BLM and other federal agencies be designed to be cost-effective in accomplishing both species' recovery and multiple use goals. *See* 134 Cong. Rec. S9766-70 (July 25, 1988) and S 10164-66 (July 28, 1988) (discussion on adoption of Sen. McClure's amendments, which became ESA § 4(f)(4) and (5)).

Adverse social and economic impacts are maximized, not minimized, through the recommendation in the Tortoise Recovery Plan, and adoption in the Tortoise Recovery Amendments, of grazing and other constraints on use of BLM lands before research demonstrates that grazing does significantly harm the Mojave tortoise population. In the absence of research demonstrating that an economic multiple use of BLM lands is significantly harmful to the Mojave tortoise population, FWS and BLM should focus their limited dollars on remediating the known major causes of tortoise deaths, URTD and predation by ravens.

Further, the Counties' tax revenues are greatly reduced, and not minimized or mitigated under PILT, by the Tortoise Land Acquisitions.

For similar reasons, FWS and BLM have violated the Regulatory Flexibility Act and related laws by not adequately assessing the economic impacts of the Acquisitions and Amendments and by not seriously considering alternatives that would reduce adverse economic impacts, while still addressing the major threats to the Mojave tortoise population.

3. Violation Of FWS's ESA Duty To Implement Its Recovery Plan – Perhaps most decisively, FWS has violated the ESA by failing to timely implement the portions of the Tortoise Recovery Plan concerning monitoring, population survey, and reassessment of the Plan. ESA § 4(f) states twice for emphasis that the "Secretary shall develop and implement [recovery] plans." 16 U.S.C. 1533(f)(1) and (2) (emphasis added). The Secretary of the Interior has delegated to FWS this mandatory duty to implement a recovery plan. Thus, FWS has a clear ESA duty to implement its own recovery plan (or to alter that plan). *See also* 16 U.S.C. 1536(a)(1). As a result, FWS is in violation of ESA §§ 4(f) and 7(a)(1): (1) by not conducting the monitoring and effectiveness assessments promised in the Tortoise Recovery Plan; (2) by not completing the population survey within five years of the 1994 publication of the Plan, as

promised in the Plan; and (3) by not reassessing the measures recommended in the 1994 Plan within the three to five year period after publication of the Plan, as promised in the Plan.[4]

Other federal agencies such as BLM must consider economic and mission impacts and other "public comment" before deciding which portions of a recovery plan they will implement in their discretion. 16 U.S.C. 1533(f)(5); *see* H.R. Conf. Rep. No. 100-298, at 21 (1988) ("the substantive requirements of [and discretion in] section 7(a)(1) of this law are not affected by this amendment;" the amendment procedurally requires "each federal agency to consider all information [e.g., economic impact and effectiveness information] presented on a recovery plan during the public comment period before implementing the recovery plan"). BLM must be able to consider and act on "public comment" that the economic costs are too high for a particular

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[4] FWS recently and belatedly announced some slow bureaucratic processes to address a few of the current legal violations described in this letter. After a number of Coalition letters to FWS had gone unanswered and after the instant letter had been drafted, FWS's California and Nevada Operations Office finally responded to the Coalition on May 7, 2003. The letter has the following elements and does not adequately resolve the legal violations asserted in this ESA citizen suit notice.

First, FWS's letter and an attachment establish a two-step process for a Desert Tortoise Recovery Plan Assessment. In the first step, a set of FWS-picked scientists will make recommendations by January 2004 on changes needed to the Tortoise Recovery Plan and FWS will largely exclude the public from this process. This closed process – where FWS's handpicked scientists will largely control the agenda on whether the Tortoise Recovery Plan should be amended and, if so, how – is contrary to the commitment in the Plan that the:

> reassessment team should consist of representatives from all affected Federal, state and local wildlife and land management agencies, and experts in the field from other agencies, the private sector and academia.

Tortoise Recovery Plan at 37. Please consider this letter as our initial comments on areas where the Tortoise Recovery Plan should be changed or improved.

In the second step, a draft revised Tortoise Recovery Plan would be prepared by October 2004. FWS has committed to no date for the final revised Tortoise Recovery Plan that should have been completed by 1999 in any event. Through this unconscionable delay, the Department will have effectively implemented all the land use constraints recommended in the deeply flawed Tortoise Recovery Plan and critical habitat designation before the long-delayed review of the Tortoise Recovery Plan occurs. Hence, FWS's proposal does not resolve the legal violations asserted in our letter.

Second, FWS's letter states that it has held workshops on "raven and feral dog predation and disease," has workshop recommendations on "disease management in desert tortoises," and will forward these recommendations to the Committee of scientists for consideration "during assessment of the Recovery Plan." The bottom line is that FWS and BLM are engaged in bureaucratic foot-dragging by instituting such a long process. The Department still is not implementing the measures most needed for the survival and recovery of the Mojave tortoise population. The third element in FWS's letter is discussed in note 7, below.

element in a recovery plan to remain consistent with the legislative intent – otherwise, ESA § 4(f)(5)'s reference to considering "all information presented during the public comment period" is sapped of meaning and its legislative intent is discarded. 16 U.S.C. 1533(f)(5); *see* 134 Cong. Rec. S9766-70 (July 25, 1988) and S 10164-66 (July 28, 1988) (discussion on adoption of Sen. McClure's amendments, which became ESA § 4(f)(4) and (5)).

Thus, BLM has discretion on the extent to which it chooses to use public lands to support recovery or conservation of the Mojave tortoise population and other ESA-listed species. *See* 16 U.S.C. 1536(a)(1); 50 C.F.R. 402.14(i) (FWS's ESA § 7(a)(1) conservation or recovery recommendations are "advisory" only); 51 Fed. Reg. 19954-55 (June 3, 1986) (explaining the legislative and regulatory intent that not all federal agency actions need to provide conservation or recovery benefits); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298-99 (5th Cir. 1998); *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992) (the conservation or recovery elements of the ESA do not expand or override an agency's statutory mandate). In the Tortoise Recovery Amendments, BLM has violated FLPMA and the APA by arbitrarily imposing land use constraints not shown to be effective in recovery of the Mojave tortoise population, in lieu of managing BLM lands for a broader set of multiple use benefits as required by (or at least allowed by) FLPMA. *See* 43 U.S.C. 1702, 1731, 1781. Moreover, BLM also acted arbitrarily to the extent that it adopted the Tortoise Recovery Amendments based on the mistaken view that each of the Amendments was necessary to fulfill an ESA duty to promote conservation of the Mojave tortoise population.

4. Unlawfully Withheld Action Under The APA – FWS's five-year time period under the Plan for completing the population survey and reassessment expired in 1999. Accordingly, at the present time, FWS's failure to complete any of these tasks constitutes "agency action unlawfully withheld or unreasonably delayed" under the APA, 5 U.S.C. 706.

5. Failure To Use The Best Available Science – ESA § 7(a)(2) requires that FWS and BLM utilize the "best scientific and commercial data available" in rendering a biological opinion on, and making a decision on, a proposed federal agency action. The Tortoise Land Acquisitions, Tortoise Recovery Amendments, and Tortoise BiOps are not based on the best available science in that they impose constraints on land uses (e.g., grazing) that are not substantiated by the best available science, and provide no effective relief on the primary threats to the existence of the Mojave tortoise population.

B. The Evolutionary Significant Units Of The Mojave Tortoise Population Established As Recovery Units In The Tortoise Recovery Plan, And Relied Upon In The Tortoise BiOps And Acquisitions And Amendments, Violate The ESA And FWS's Current DPS Policy

Background - ESA § 4(a)(1) authorizes listing by the "species" unit. 16 U.S.C. 1533(a)(1). ESA § 3(16), as amended in 1978, defines a "species" to include not only a true biological species, but also "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." *Id*. § 1532(16) (emphasis added). The 1978 ESA amendments eliminated the broader ability under the 1973 ESA to list any "group of fish or wildlife...in common spatial arrangement." 87 Stat. 886 (1973). The 1978 ESA amendments substituted a more restrictive phrasing which

forbids the listing of invertebrates below the "subspecies" level and allows only the listing of those vertebrates that comprise a "distinct population segment...which interbreeds when mature" ("DPS"). 16 U.S.C. 1532(16). As two noted commentators have described, the 1978 Congress "limited" listing authority for a wildlife grouping below the subspecies level due to the "political desire to limit the number of listed taxa" and to avoid trivializing the ESA by "protect[ing] peripheral populations," especially when "many common species are uncommon or rare at the edge of their range." BEAN & ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 200 (3d ed. 1997).[5]

In 1996, FWS and the National Marine Fisheries Service (the "Services") published a Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act ("DPS Policy"), 61 Fed. Reg. 4722 (Feb. 7, 1996). The DPS Policy applies to "listing, delisting, and reclassifying species" under the ESA. 61 Fed. Reg. 4722 and 4725; *see* 68 Fed. Reg. 15804 (April 1, 2003) (de-listing and reclassifying different groups of gray wolves based on whether they were DPSs under the DPS Policy) . Since the purpose of a recovery plan is the "conservation" of the listed species to the point that it can be delisted (or at least reclassified from endangered to threatened status), the DPS Policy applies to recovery plans. *See* 16 U.S.C. 1532(3), 1533(f). The DPS Policy would find a DPS only if the alleged population is both: (1) discrete, in terms of being "markedly separated from other populations of the same taxon"; and (2) significant, in terms of being "importan[t] to the taxon [the biological species] to which it belongs." 61 Fed. Reg. 4725.

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[5] As the General Accounting Office ("GAO") described in 1979, there was a concern that, under a loose definition of "species," the ESA could be trivialized and the economic constraints of the ESA unwisely imposed to protect units as small and insignificant as a "population" of squirrels in a city park:

> [S]quirrels in a specific city park could be listed as endangered, even though an abundance of squirrels lived in other parks in the same city and elsewhere.... Such listings could increase the number of potential conflicts between endangered and threatened species and Federal, State, and private projects and programs.... However, the purpose of the Endangered Species Act is to conserve endangered and threatened species and their critical habitats, not preserve every individual animal and plant.

Endangered Species – A Controversial Issue Needing Resolution 52, 58 (GAO- Rep. CED-79-65, 1979). Responding to the GAO Report, the Senate Report on the 1979 ESA Amendments stated the legislative intent that the authority to list a DPS be used only "sparingly":

> [L]isting of populations may be necessary when a preponderance of evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations. Nonetheless, the Committee is aware of the great potential for abuse of this authority and expects FWS to use the ability to list populations sparingly and only when the biological evidence indicates that the action is warranted.

S. Rep. No. 96-151, at 7 (1979) (emphasis added).

1. The Tortoise Recovery Plan Violates The ESA And The DPS Policy By Employing ESUs And Recovery Units Smaller Than A DPS – When FWS listed the Mojave tortoise population as a "threatened species," it did so on the basis that the Mojave Desert was the area inhabited by a genetically-discrete population or DPS of desert tortoise:

> Recent studies based on shell shape and variations in genetic composition indicate that the species has two distinct populations, the Mojave and Sonoran populations. The Mojave population may be further divided into two subpopulations based on allozyme and mitochondrial DNA analysis. The genetic differences within the Mojave population appear to be more like a cline or gradation from east to west The Colorado River has been an effective geographic barrier, separating the Mojave and Sonoran populations for millions of years.... The Mojave population may be further divided into two subpopulations, western and eastern.

55 Fed. Reg. 12170 (April 2, 1990).

Thus, according to the preamble of the listing rule, the listed Mojave tortoise population constitutes the smallest DPS unit that meets: (1) the standards in the ESA (which refers to a population which "interbreeds when mature" or to a reproductively-isolated population); and (2) the "discreteness" (genetically and reproductively isolated) and "significance" standards of the DPS Policy. Any smaller divisions would concern only "subpopulations." 55 Fed. Reg. 12170. Yet, neither the ESA nor the DPS Policy provide for listing, recovery plans, and delisting by subpopulations or by any other unit smaller than a DPS. *Accord* 68 Fed. Reg. 15804 (April 1, 2003) (delisting and changing the ESA classification for the gray wolf by DPS units).

The Tortoise Recovery Plan establishes recovery units smaller than a DPS, in violation of the ESA and the subsequent DPS Policy, and without the rulemaking that would be required to change the "species" unit for listing, delisting, and ESA § 7 compliance purposes. The Plan subdivides the Mojave tortoise population or DPS into six geographical "evolutionarily significant units" ("ESUs"), each of which comprises a separate "recovery unit."[6] Tortoise Recovery Plan at 19-26.

- The Northern Colorado Recovery Unit, Eastern Colorado Recovery Unit, and Western Mojave Recovery Unit are all described as having the "California mtDNA haplotype and California shell type" (or using equivalent words). Tortoise Recovery Plan at 20-22. Thus, at least these three ESUs or recovery units are mere subsets of one interbreeding population or DPS.

- The Eastern Mojave Recovery Unit includes desert tortoises with "both the California and the southern Nevada mtDNA haplotype and the California shell type." *Id*. at 21. Similarly,

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[6] The Tortoise Recovery Plan errs in employing the term "evolutionarily significant unit." Only NMFS has authorized use of the ESU terminology. *See* 56 Fed. Reg. 58612 (Nov. 20, 1991). NMFS's ESU "policy applies only to species of salmonids native to the Pacific," not to tortoises in the desert. 61 Fed. Reg. 4722 (preamble discussing FWS's separate DPS Policy).

> [t]hree mtDNA haplotypes are found in the" Northeastern Mojave Recovery Unit." *Id.* While the "mtDNA have not been studied" for the Upper Virgin River Recovery Unit, the "allozyme variation is similar to that found in the northeastern Mojave recovery unit." *Id*. Thus, none of these three alleged ESUs and recovery units purports to describe the range inhabited by a single "distinct" and interbreeding DPS smaller than the Mojave tortoise population DPS.

Indeed, the Tortoise Recovery Plan itself concedes that the only two distinct population segments of the desert tortoise in the American southwest are the Mojave tortoise population (which was listed as a threatened species) and the Sonoran tortoise population (which was listed outside its range on a similarity-of-appearance basis):

> Although [Jennings] found no fixed genetic differences among samples, phenograms generated from genetic distance values suggest two major population groupings that correspond roughly with the Mojave region and Sonoran Desert in Arizona.... Based on mitochondrial DNA [Analysis]..., Lamb et al. (1989) described three major genetic units within *G. agassizii.* One unit is found in the Colorado and Mojave deserts and a second in the Sonoran Desert from west-central Arizona to central Sonora. The Colorado River appears to have been a sufficient barrier for these two assemblages to have evolved independently since the Pliocene.... Morphological variation coincides reasonably well with the mtDNA genotypes found north of Mexico.... Thus, based on genetic and morphological criteria, *G. agassizii* is divided into at least two well-differentiated entities, one in the Sonoran desert in Arizona and one in the Mojave region. A third may exist in Sonora and Sinaloa, Mexico.

Tortoise Recovery Plan at 17.

The preambles to the listing and critical habitat rules provide further evidence that the alleged ESUs are not isolated or genetically (or morphologically) distinct. For example:

> There appear to be <u>no natural barriers</u> that would prevent transfer of infectious agents from already infected groups of animals anywhere in the Mojave Desert. The release of diseased captive tortoise may spread the disease faster than the <u>natural movement of tortoises between areas</u>.

55 Fed. Reg. 12170, 12187 (April 2, 1990) (emphasis added).

> The basic shell shapes (phenotypes) are indicative of desert tortoise populations in distinct geographic areas within their range (Weinstein and Berry 1988). Tortoises occurring in California and southern Nevada exhibit a boxlike, high-domed shell phenotype; Beaver Dam Slope tortoises have a short plastron (underside) and a low-domed shell phenotype; and Sonoran Desert tortoises have a pear-shaped, low-domed shell phenotype (Weinstein and Berry 1988). Furthermore, identification of the three phenotypes parallels results of mitochondrial DNA (mtDNA) studies that also 'type' desert tortoises into the same three populations based on genetics (Lamb et al. 1989).

59 Fed. Reg. 5820, 5823 (Feb. 8, 1994). Thus, FWS acted unlawfully in devising a recovery strategy for a classification different from that upon which listing is based, and different from any biologically-valid DPS or, should FWS adopt the ESU concept, ESU.

Moreover, fundamental statutory requirements of the APA and ESA § 4 prevent the modification of the listed "threatened species" unit (the Mojave tortoise population) except through notice and comment rulemaking. In contrast, FWS is following the required rulemaking procedures with respect to DPSs of the gray wolf. *See* 68 Fed. Reg. 15804 (April 1, 2003). Here, the Tortoise Recovery Plan's establishment of six ESUs or DPSs of desert tortoises without rulemaking procedurally violates the ESA and APA.

In sum, the ESUs and recovery units in the Tortoise Recovery Plan are substantively and procedurally unlawful. They do not correspond to the range occupied by any genetically distinct and interbreeding population, as both the ESA and the DPS Policy require for a DPS unit that is the smallest lawful focus for the ESA's special protections. These fundamental errors should be corrected during the overdue reassessment of the Tortoise Recovery Plan.

2. The Tortoise BiOps Unlawfully Used The Alleged ESU Or Recovery Unit As The Basis For Assessing Jeopardy To The Threatened Species – In some Tortoise BiOps, FWS used each ESU or recovery unit established in the Tortoise Recovery Plan as the basis or unit for assessing whether BLM's proposed land use actions would jeopardize the continued existence of the Mojave tortoise population:

> Any analysis of whether an action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat must consider the scale of the impact in relation to the critical habitat unit, recovery unit, or range of the species, as appropriate. Because the recovery plan (Service 1994c) suggests that delisting of the desert tortoise could occur by recovery unit, we have used recovery units as the basis for our evaluation.

2002 Tortoise BiOp at 48.

This approach violates the ESA. FWS listed as a "threatened species" under ESA § 4 the entire Mojave tortoise population (a DPS) – FWS's listing rule gave no special ESA status to any alleged subpopulations or ESUs of the Mojave tortoise DPS. *See* 55 Fed. Reg. 12170 (April 2, 1990); 50 C.F.R. 17.11(h). ESA § 7(a)(2) is clear that the jeopardy constraint is applied to the entire listed "threatened species," not to some smaller grouping of the "threatened species." *See* 16 U.S.C. 1536(a)(2) (each federal agency shall ensure that its proposed action "is not likely to jeopardize the continued existence of any...threatened species"). ESA § 7(b) and the Services' implementing regulations are equally clear that FWS's biological "opinion" is rendered with respect to whether the "agency action" would cause "jeopardy" to the entire listed "species." *Id.* § 1536(b)(3); *see* 50 C.F.R. 402.02 (definitions of "jeopardize the continued existence of" and "listed species," which refer to appreciably reducing the likelihood of survival of the entire listed threatened species); 402.14(g) and (h) and (i) (the biological opinion is rendered on whether the proposed action is "likely to jeopardize the continued existence of a listed species"; where jeopardy to the listed species is avoided, the incidental take of a few individuals is permitted); 51

Fed. Reg. 19934-36, 19952-55 (June 3, 1986) (comparable statements in the preamble to the final ESA § 7 rules).

Thus, the Tortoise BiOps violated ESA §§ 4 and 7 and implementing rules when FWS applied the jeopardy constraint to an alleged ESU of desert tortoise (a single recovery unit), instead of merely to the threatened species as a whole (the Mojave tortoise population). FWS's approach distorts the ESA and has great practical significance. It is easier to find that a proposed action is likely to jeopardize the survival of some small subpopulation in a single recovery unit than it is to find that a site-specific action is likely to jeopardize the survival of a widely-dispersed and more numerous "threatened species."[7] As reinforced below in point 3, by parsing the "threatened species" too finely below the level of a DPS in the Tortoise Recovery Plan and Tortoise BiOps, FWS has unlawfully increased the stringency of, and misery inflicted by, the ESA.

3. The Creation Of Too Many Recovery Units In the Recovery Plan Caused Too Many Large Land Area To Be Removed From The Tax Base And From Productive Multiple Uses As ACECs And The Like In The Tortoise Recovery Amendments And Tortoise Land Acquisitions – Instead of proposing to do what was necessary for the survival and ultimate recovery of a single Mojave tortoise DPS, the Tortoise Recovery Plan proposed burdensome constraints on the greater acreage needed to ensure the survival and recovery of each of six alleged ESUs in six recovery units. Tortoise Recovery Plan at 20-23, 31-43. Thus, FWS's designation of too many ESUs and recovery units in the Tortoise Recovery Plan has adverse practical consequences.

For example, because the numbers of desert tortoises in each recovery unit were smaller and more susceptible to extinction, the Plan recommended a "reserve architecture" which contains "redundancy" in the DWMAs so that the loss of one subpopulation (e.g., due to URTD) would not lead to the loss of all desert tortoises in that single recovery unit. *Id*. at 34-36 and

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[7] FWS was noncommittal and nonsensical in its May 2003 response to the Coalition's earlier recitations of the arguments in points 1 and 2 above. FWS admits that "DPSs for the purpose of delisting" can be established only through a "formal rulemaking process," but does not admit that the same rulemaking process must be followed before DPSs below the level of the Mojave tortoise population could be employed in Tortoise BiOps or in the Tortoise Recovery Plan. Instead, FWS seems to argue that, since "Notices of Availability of the draft and final recovery plans were published in the Federal Register," this is the equivalent of a rulemaking process. Yet, announcing the availability of a 150-page plus document in an obscure Federal Register notice is not the same as rulemaking on establishing DPSs of a DPS (the Mojave tortoise population), and responding to public comment on why the sub-DPSs are not valid distinct populations of desert tortoises under the controlling and sparingly-applied DPS Policy. Since the ESA only authorizes recovery and consultation actions on the scale of the "species" unit that was listed after a public rulemaking process, the Department must base its recovery and consultation actions on that listed "species" unit (the Mojave tortoise population) unless and until FWS completes a rulemaking process validly creating some other DPS unit for the desert tortoise.

Appendix C. Using this redundancy principle, the Tortoise Recovery Plan recommends that 14 DWMAs be established in six recovery units to protect six alleged ESUs of the Mojave desert tortoise population. *Id*. at 36-42.

On the other hand, when FWS recently considered the ESA status of the gray wolf, it found that the true reproductively-isolated DPSs covered a far larger area (e.g., the Eastern DPS and Western DPS) and that the maintenance of two or three subpopulations within each DPS satisfied the recovery desire for redundancy. *See* 68 Fed. Reg. 15810 (April 1, 2003). This suggests that, when the Tortoise Recovery Plan is reassessed and the true DPS is used as the recovery unit (the entire Mojave tortoise population), FWS and BLM could likewise find that only two or three DWMAs are needed to satisfy the desire for redundancy to assist in the recovery of the Mojave tortoise DPS.

At the present time, the Tortoise Recovery Plan , the Tortoise Recovery Amendments, and the Tortoise Land Acquisitions unlawfully proceed down the path that GAO and Congress opposed in 1978 and 1979 – striving to protect each existing group of squirrels (or tortoises) in each city park (or in each arbitrarily-constructed ESU and recovery unit). When FWS parses too finely the grouping of a vertebrate species in listing or recovery contexts, FWS quickly gets to the point that it lists each locally-rare "population" (even if the biological species is not imperiled) and then the Department strives to preserve the habitat around each currently-existing subpopulation to maximize the potential for recovery of each subpopulation. The ultimate results are: (1) a striving to protect "each individual animal" under ESA § 4 listing and recovery planning, whereas the ESA merely seeks to protect a "distinct population" or gene pool; and (2)an "increase[in] the number of potential conflicts between endangered and threatened species and Federal, State, and private projects and programs." *Endangered Species – A Controversial Issue Needing Resolution* 52, 58 (GAO, Rep. CED 79-65, 1979).

When FWS revises the Tortoise Recovery Plan, it must consider and should adopt an option that attempts to recover the Mojave tortoise population as a whole – the listed DPS – and not in each of its unlawfully designated distinct population segments or ESUs. FWS can do so by employing a smaller number of, and smaller acreage of, recovery units or DWMAs. This will decrease the conflicts between human uses and tortoise uses of BLM and private lands. In the interim, the Tortoise Land Acquisitions and Tortoise Recovery Amendments on BLM lands should not implement the overinclusive Tortoise Recovery Plan.

C. Other Violations Concerning The Tortoise Recovery Plan

1. The Recommended DWMAs Bear No Rational Relationship To The Alleged ESUs And Recovery Units – As discussed above in Section I.B, the Tortoise Recovery Plan errs in establishing ESUs and recovery units smaller than a DPS.

Moreover, even assuming *arguendo* that the ESUs and recovery units do correspond to the limits of some group of desert tortoises that differs slightly from adjacent groups of desert tortoises, then the DWMAs recommended in the Tortoise Recovery Plan, and adopted in the Tortoise Recovery Amendments, are arbitrary and unlawful. The maps of the recommended DWMAs show that several DWMAs straddle two or more recovery units. *See* Tortoise Recovery Plan at 39-42. "[S]ome of [the proposed DWMAs] occur in more than one recovery

unit." *Id*. at 36. If each recovery unit comprises the range of an ESU of desert tortoises (as the Tortoise Recovery Plan asserts), then FWS has provided no rational reason why the DWMA designed to protect that ESU should extend across more than one recovery unit.

Both the recovery units and DWMAs seem to be arbitrary lines drawn on a map. At the very least, either the recovery units or the DWMAs in the Plan have arbitrary boundaries. This provides yet another set of reasons why the Tortoise Recovery Plan is sorely in need of the long-delayed revision. In the interim, it is arbitrary and unlawful for BLM to be basing its land use actions on such a flawed and over-inclusive Tortoise Recovery Plan.

2. The Tortoise Recovery Plan Exceeds By Extraordinary Magnitude What Is Needed For Recovery Of The ESA-Listed Species, And Therefore Is Invalid Under ESA § 4(f) – The 14 DWMAs that the Tortoise Recovery Plan recommends in six recovery units cannot be justified as being required solely for the survival and recovery of the single listed DPS, the Mojave tortoise population. *See* Section I.B, above. The Plan strongly suggests – and the arbitrary structure of the recovery units and DWMAs tends to confirm – that the number and extent of DWMAs were recommended for more general ecosystem conservation, watershed protection, and even human recreation purposes. For example:

> Desert Wildlife Management Areas (DWMAs) [e.g., for all desert wildlife, not just the more limited needs of the desert tortoise] need to be identified in which recovery actions will be implemented to provide for the long-term persistence of viable desert tortoise populations and the ecosystems on which they depend.... DWMAs should protect the environments in which the desert tortoise lives. In preserving these environments, other species will benefit, including many rare and/or sensitive species. Land managers are encouraged to take a multi-species approach to reserve design and include habitat of other rare or declining species into DWMAs.... DWMAs will serve as recovery sites for the desert tortoise, but they will also be important as ecosystem reserves and as habitat for other rare and/or sensitive species or communities. DWMAs also can play a secondary role in providing watershed protection and some forms of recreation which are compatible with desert tortoise recovery. Management actions should be tailored to meet these other needs whenever possible. These concepts helped shape the management recommendations in Section II.E., Appendix F, and Brussard et al. (1994).

Tortoise Recovery Plan at 31, 36, 51. The creation of recovery units and DWMAs which, both in size and constraints, go beyond the needs of the threatened Mojave tortoise population violates the ESA. FWS exceeds its ESA authority by almost unimaginable magnitude when it produces recovery plans advocating land set-asides for species not listed as endangered or threatened and for such general purposes as watershed protection and recreation.

More specifically, this encouragement of broader ecosystem and other preservationist objectives goes beyond the appropriate and lawful role for a recovery plan. Under ESA § 4(f), a recovery plan should be limited to what is necessary "for the conservation [or recovery] and survival of endangered species and threatened species listed pursuant to this section," and should not include elements designed to promote any particular set of other, unlisted species. 16 U.S.C. 1533(f)(1).

For this reason as well, the Tortoise Recovery Plan is inconsistent with the ESA and should be promptly amended. Until the 1994 Tortoise Recovery Plan is placed on a firm scientific and legal footing, the Department and BLM are acting unlawfully in implementing questionable elements of that Plan in the Tortoise Recovery Amendments.

II. ESA Violations Concerning The Designation Of Critical Habitat, And Its Implementation In The Tortoise Land Acquisitions And Tortoise Recovery Amendments

1. The ACECs And Other Elements Of The Acquisitions And Amendments, And The Designated Critical Habitat For The Mojave Tortoise Population, Are Unlawful Because They Are Based On The Unlawful Tortoise Recovery Plan – FWS designated approximately 6.4 million acres of critical habitat for the Mojave tortoise population at 59 Fed. Reg. 5820 (Feb. 8, 1994).[8] The designation of this large acreage as critical habitat caused BLM to protect the comparably large areas designated as ACECs for the Mojave tortoise population in the Tortoise Recovery Amendments, and has been further implemented in the Tortoise Land Acquisitions.

FWS designated this huge land area as critical habitat for the Mojave tortoise population based on, and to implement, the then-draft Tortoise Recovery Plan:

> The Draft Recovery Plan...divides the range of the desert tortoise into 6 recovery units and recommends establishment of 14 Desert Wildlife Management Units (DWMAs) within the recovery units.... The Service used the DWMAs as the basis for CHUs [critical habitat units].... Recovery planning under section 4(f) of the Act is the "umbrella" that eventually guides all of the Act's activities and promotes a species' conservation and eventual delisting. Because critical habitat designation was based on the recommendations provided in the Draft Recovery Plan, final critical habitat will be

[8] Critical habitat designations injure the Counties and users of public lands only when and to the extent that: (1) BLM or some other landowner implements the critical habitat designation by setting aside lands for tortoise recovery (as NECO and NEMO did in 2002); (2) BLM or some other landowner otherwise uses the critical habitat designation as a basis for decisionmaking on allowed and disallowed land uses (including federal agency actions that are reviewed under ESA § 7(a)(2) to determine whether they would adversely modify critical habitat). *See* 59 Fed. Reg. 5833 ("critical habitat is not intended as a management or conservation plan.... The final DWMA boundaries will be determined by land management agencies, in consultation with the Service, through a planning process") (preamble to final rule designating critical habitat for the Mojave tortoise population). Since many Tortoise Land Acquisitions did not occur until the 1998 to 2003 era, and since the planning processes for designating critical habitat units and DWMAs as Areas of Critical Environmental Concern were completed only in the 1998 to 2003 era, the Counties' claims against the critical habitat designation are ripe at this time. *See* pages 3-5, above. Further, the critical habitat designated for the Mojave tortoise population was a proximate cause of the Acquisitions and Amendments. *See*, e.g., 2002 Tortoise BiOp at 20 (the "desert wildlife management areas would include all critical habitat in the Northern and Eastern Mojave planning area except for" approximately 13,000 acres).

> incorporated as part of the final recovery plan for the desert tortoise... Critical habitat is based upon the recommendations of the Draft Recovery Plan because it lays out the framework for identifying and evaluating habitat.... The proposed and final designations include at least one CHU within each of the six recovery units outlined in the Draft Recovery Plan. The size of these areas is based primarily on the requirements to support [multiple] self-sustaining populations.

59 Fed. Reg. 5820, 5821, 5824, 5833, 5835, 5837 (Feb. 8, 1994). With a few minor adjustments to the proposed DWMAs (e.g., not including the proposed Joshua Tree DWMA because these National Park Service lands were already protected; folding the proposed Fenner DWMA into the contiguous Piute-Eldorado CHU), the 14 DWMAs recommended in the Draft Tortoise Recovery Plan formed the basis for the 12 critical habitat units designated by FWS. *See* 59 Fed. Reg. 5825, 5842, 5847-66.

Yet, the Tortoise Recovery Plan is unlawful and arbitrary in recommending that 14 large DWMAs be set aside for the recovery of what is actually a single DPS, the Mojave tortoise population. *See* Section I.B. Since the unlawful draft Plan provided the basis for designating 6.4 million acres of critical habitat in 12 units,[9] the critical habitat designation is equally unlawful, arbitrary, and excessive. Moving down the chain of causation, this means that the extensive ACECs that BLM designated in the Tortoise Recovery Amendments and the extensive non-federal lands removed from productive land uses by the Tortoise Land Acquisitions are equally unlawful, arbitrary, and excessive.

FWS has promised that, if the Tortoise Recovery Plan is altered, "the Service will reevaluate the critical habitat designation." 59 Fed. Reg. 5842; *see id*. at 5821. Thus, at the very least, once the long-delayed review and revision of the Tortoise Recovery Plan are completed, FWS should make corresponding changes to critical habitat. When the Tortoise Recovery Plan is modified to only include those DWMAs needed for the survival and recovery of a single DPS (the Mojave tortoise population), this should lead to fewer critical habitat units and less acreage being designated as critical habitat. In the interim, it is unlawful and arbitrary for the Department to implement the Tortoise Recovery Amendments and to recommend Tortoise Land Acquisitions, that are based on the unlawful and excessive critical habitat designation and Tortoise Recovery Plan.

2. The Critical Habitat Designation Should Be Rescinded Due To An Improper Analysis Of, And Consideration Of, Economic Impacts – ESA § 4(a)(3) provides that critical habitat ordinarily shall be designated "concurrently" with the listing of a species. During the process of designating critical habitat, ESA § 4(b)(2): (1) specifies that FWS shall "tak[e] into

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[9] The preamble to the final rule confirms that 6.4 million acres were designated in order to ensure the recovery of six separate "populations":

> The proposed and final designations include at least one CHU within each of the six recovery units outlined in the Draft Recovery Plan. The size of these areas is based primarily on the requirements to support self-sustaining populations.

59 Fed. Reg. 5837.

consideration the economic impacts, and any other relevant impacts, of specifying any particular area as critical habitat"; and (2) allows FWS to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of" designating an area as critical habitat. 16 U.S.C. 1533(b)(2).

As the Tenth Circuit has held, FWS's approach to this economic analysis – considering only the incremental economic impacts resulting from designation of critical habitat above and beyond the economic impacts created by the listing of an endangered or threatened species and the automatic application of the jeopardy constraint in ESA § 7(a)(2) to any species listed as an endangered or threatened species – violates the ESA:

> The crux of the statutory dispute is in determining the meaning of "economic impact" in 16 U.S.C. § 1533(b)(2). The baseline approach adopted by the FWS utilizes a "but for" method of determining what economic impacts flow from the CHD [critical habitat designation]. Thus, unless an economic impact would not result but for the CHD, that impact is attributable to a different cause (typically listing) and is not an "economic impact...of specifying any particular area as critical habitat....The root of the problem lies in the FWS's long held policy position that CHDs are unhelpful, duplicative, and unnecessary.... The statutory language is plain in requiring some kind of economic consideration of economic impact in the CHD phase. Although 50 C.F.R. 402.02 is not at issue here, the regulation's definition of the jeopardy standard as fully encompassing the adverse modification standard renders any purported economic analysis done utilizing the baseline approach virtually meaningless. We are compelled by the canons of statutory interpretation to give some effect to the congressional directive that economic impacts be considered at the time of critical habitat designation.... Because economic analysis done using the FWS's baseline model is rendered essentially without meaning by 50 C.F.R. § 402.02, we conclude Congress intended that FWS conduct a full analysis of all the economic impacts of critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes. Thus, we hold the baseline approach to economic analysis is not in accord with the language or intent of the ESA.... [I]f the FWS's position that the protections afforded by a CHD are subsumed by the protections of listing is accepted, this ruling [described earlier to be "considering economic impacts at a point subsequent to listing" even if those impacts are "attributable co-extensively" to listing] will result in no decreased protection for endangered species or their habitat [as the listing and jeopardy constraint will remain intact].... As set forth above, the baseline approach to economic analysis pursuant to 16 U.S.C. § 1533(b)(2) is expressly rejected.

New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service, 248 F.3d 1277, 1283-85 (10th Cir. 2001).

This Administration has acquiesced in *New Mexico Cattle*'s reading of the ESA by agreeing to conduct new economic analyses and to vacate critical habitat designations based on *New Mexico Cattle*. Where environmental group intervenors have resisted these settlements, courts have ruled that *New Mexico Cattle* correctly construes the ESA and that vacatur of the relevant critical habitat designation is appropriate. E.g., *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, No. CV F 01-5722 AWI SMS, slip op. at 35-42, 52-

58 (E.D. Cal. decided May 9, 2003); *Building Industry Legal Defense Foundation v. Norton*, 231 F. Supp.2d 100 (D.D.C. 2002); *see generally* Steven P. Quarles and Thomas R. Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner?*, 48 Rocky Mt. Min. L. Inst. 18-1, 18-27 to 29 (2002).

The critical habitat designation for the Mojave tortoise population is invalid, and should be rescinded, because it relies on the same incremental or baseline approach to economic analysis that this Administration has agreed violates the ESA. That economic analysis violates the ESA as construed in *New Mexico Cattle* and *Home Builders Ass'n of Northern California*, as it was incremental:

> The economic effects of designating critical habitat for the desert tortoise are the incremental impacts over and above...previous events, including the listing of the desert tortoise. The economic analysis considers the critical habitat impacts to be those incremental impacts that are expected as a result of the critical habitat.... The economic analysis assumed those values that were in place prior to critical habitat (e.g., ...section 7 jeopardy standard,...and section 9 prohibitions) as the baseline for this analysis. As a result, critical habitat effects were those incremental effects that would occur solely as a result of the critical habitat proposal above and beyond the effects of these other actions.... Therefore, economic costs and benefits of critical habitat designation were defined as the economic effects that: (1) Exceed those that resulted from listing the desert tortoise as a threatened species in April 1990....

59 Fed. Reg. 5825-26 (emphasis added); *see id*. at 5828-32, 5843.

Unsurprisingly, this approach – which hides most of the ESA's economic impacts in the baseline – yielded an artificially low set of incremental economic impacts attributable solely to the designation of critical habitat. *See* 59 Fed. Reg. 5828-32. Since the "Service concluded that the economic impacts that would be incurred from critical habitat designation would not be significant," the "Service did not recommend any exclusions based on economic effects." 59 Fed. Reg. 5826. Thus, the ESA violation concerning the ESA § 4(b)(2) economic analysis infects the legality of the entire critical habitat designation and subsequent BLM adoption of ACECs to fulfill the broad critical habitat designation.[10] The existing critical habitat designation (and the ACECs designated for tortoise protection) should be rescinded until FWS conducts a proper economic analysis and a proper consideration of the costs and benefits of excluding lands from being designated as critical habitat. This is what FWS has agreed to do in numerous cases that follow *New Mexico Cattle*.

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[10] Moreover, the improper critical habitat designation imminently affected the Counties and created a ripe controversy when in 1999-2003 the Tortoise Land Acquisitions removed private lands from the Counties' tax bases and the Tortoise Recovery Amendments set aside areas as tortoise ACECs, and reduced grazing and access uses of specific lands, that correspond largely to the designated critical habitat. *See* pages 2-5, above.

3. The Critical Habitat Designation And ACECs Improperly Include Lands Which Do Not Contain Features Essential To The Conservation Of The Mojave Tortoise Population, And The Critical Habitat Designation Does Not Identify The Geographic Areas Occupied By The Listed Species – The Alameda whipsnake critical habitat decision found four related ESA violations of the ESA § 3(5) definition of "critical habitat" which the Counties and Coalition assert also occurred in designating broad areas of critical habitat for the Mojave tortoise population. Those related violations are: (1) the ESA requires an identification of the "physical or biological features " in designated critical habitat areas that are "essential to the conservation of the species"; (2) the ESA requires an identification of the "geographical area occupied by the species" at the time of listing, and requires additional findings before designating currently unoccupied habitat as critical habitat; (3) the ESA limits critical habitat to areas which "may requires special management considerations or protections"; and (4) most importantly, the designated critical habitat must be limited to the "specific areas" containing those features and which may require special management attention. *Home Builders Ass'n of Northern California v. FWS*, No. 01-5722, slip op. at 10-35 (E.D. Cal. decided May 9, 2003); *see* 16 U.S.C. 1532(5).

Most significantly, the lands formally designated as critical habitat for the Mojave tortoise population were described as all lands within the external boundaries of the legal descriptions in 50 C.F.R. 17.95(c). *See also* 59 Fed. Reg. 5846-66 (legal descriptions and maps). The designated critical habitat contains some developed areas not essential for tortoise conservation:

> [I]t was not possible to exclude all areas of non-habitat via boundary revisions. In some cases, CHUs contain small towns, farms, or human-made structures.

59 Fed. Reg. 5836.

The ESA only permits the inclusion in designated critical habitat of "the specific areas within the [general] geographic area occupied by the species" which, "at the time it is listed" contain the "physical or biological features...essential to the conservation of the species." 16 U.S.C. 1532(5). The critical habitat designation is invalid to the extent it includes areas which in the 1990-1994 era did not contain the habitat features essential to the conservation of the Mojave tortoise population. *See Home Builders Ass'n of Northern California v. FWS*, No. 01-5722, slip op. at 10-22 (E.D. Cal. decided May 9, 2003) (setting aside the designation of critical habitat for the Alameda whipsnake partially on the grounds that FWS failed to identify the physical or biological features essential to the conservation of the species and failed to limit the designated critical habitat to the "specific areas" containing those features).

The preamble strives to avoid this result, but arbitrarily creates confusion, when it states:

> These areas [e.g., "small towns"], although physically located within the boundaries of critical habitat, are not included in critical habitat designation because they do not contain any of the primary constituent elements of desert tortoise habitat. Areas not currently containing all of the essential features, but with the capability to do so in the future, may still be needed for the long-term conservation of the species....

59 Fed. Reg. 5836. It is unclear whether the preamble can exclude from critical habitat (and from the ESA § 7 consultation duty) lands that are included under the text of the published critical habitat rule.[11] And, the intent of the two sentences quoted above is unclear – the first sentence seems to say that lands not currently containing the primary constituent elements are not designated as critical habitat, while the second sentence implies the opposite conclusion. Thus, the rule and its preamble are arbitrarily imprecise on which lands are truly designated as critical habitat for the Mojave tortoise population. This issue as well should be resolved through a new rulemaking on critical habitat.

Finally, the ESA does not allow this approach of designating a broad area as potentially critical habitat, imposing costs on federal action agencies and the non-federal sector to survey for the true critical habitat, and ultimately relying on ESA § 7 consultation to identify the true critical habitat. Quarles & Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner?*, 48 Rocky Mt. Min. L. Inst. 18-35 to 36 (2002).

> Nothing in the ESA permits the Service to defer the assessment of where the essential habitat features are found until consultation under Section 7 of the ESA is required. To the contrary, such a procedure contradicts the express language of the ESA that critical habitat comprises "specific areas" where "physical or biological features" "essential to the conservation of the species" "are found." 16 U.S.C. § 1532(5)(A)(i) (emphasis added).

Home Builders Ass'n of Northern California v. FWS, No. 01-5722, slip op. at 21 (E.D. Cal. decided May 9, 2003).

4. FWS Violated The National Environmental Policy Act In Designating Critical Habitat – NEPA requires an environmental impact statement ("EIS") on a federal action with environmentally-significant consequences, and an environmental assessment ("EA") to explore alternatives on a federal action with less-significant environmental impacts. *See* 42 U.S.C. 4332; 40 C.F.R. Group 1500. While the Ninth Circuit has held that critical habitat designations are categorically exempt from NEPA, the Tenth Circuit has reached the opposite conclusion and the Tenth Circuit's analysis is more in accord with NEPA's language and statutory interpretation principles. *Compare Catron County Bd. of Comm'rs v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), *with Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995); *see* Quarles & Lundquist, *Critical Habitat: Current Centerpiece of Endangered Species Act Litigation and Policymaking: Critical for Whom? The Species or the Landowner?*, 48 Rocky Mt. Min. L. Inst. 18-1, 18-29 to 30 (2002).

Portions of the critical habitat designated for the Mojave tortoise population lie within the boundaries of the Tenth Circuit (in Utah). Yet, FWS did not prepare either an EA or an EIS on that designation action. *See* 59 Fed. Reg. 5841, 5845. As a result, FWS did not compare the

[11] In other critical habitat situations, FWS has expressly stated in the text of the rule that the designated critical habitat includes only lands containing described features or elements. E.g., 50 C.F.R. 17.95 (critical habitat for red-legged frog and many other listed species).

environmental and quality of life impacts of alternative configurations of critical habitat, and the Counties were denied an opportunity to comment on the NEPA document and its alternatives. The absence of any NEPA document violates NEPA. The Counties were injured when BLM relied on the designated critical habitat in structuring its Tortoise Plan Amendments in 1999 to 2003.

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The Counties and the Coalition urge the Department, FWS, and BLM to eliminate the need for litigation by immediately curing the legal violations described above. Please contact me if you would like to discuss any of these matters further.

Sincerely,

Steven P. Quarles

Attorney for Mohave County, Arizona; Imperial, Kern, and San Bernardino Counties, California; Lincoln County, Nevada; Washington County, Utah; and QuadState County Government Coalition

cc: Mr. Robert D. Williams, Tortoise Project Leader, FWS, Reno, Nevada